

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

IN RE: \*

CRESCENT CITY ESTATES, LLC \*

Debtor \* \* \* \*

DOUGLAS S. DRAPER, et al. \*

Appellants \*

vs. \*

\* CIVIL ACTION NO. MJG-08-2640

MR CRESCENT CITY, LLC, et al. \*

Appellees \*

\* \* \* \* \*

DECISION ON APPEAL

The Court has before it Appellants, Douglas S. Draper's and William J. Murphy's, interlocutory appeals<sup>1</sup> from the Order of the Bankruptcy Court entered September 17, 2008 and the materials submitted relating thereto. The Court has held a hearing and had the benefit of the arguments of counsel.

I. BACKGROUND

In February 2007, Plaintiffs sued Defendants in the Circuit Court for Baltimore City asserting various claims. In August 2007, Defendant, Crescent City Estates, LLC ("CCE"), filed a

---

<sup>1</sup> By Memorandum and Order Re: Interlocutory Appeal [Document 13] (the "Interlocutory Appeal Order"), the Court followed the recommendations of the Bankruptcy Court and granted Appellants leave to proceed with the instant interlocutory appeal.

voluntary bankruptcy petition in the Eastern District of Louisiana and timely filed a notice of removal to the Bankruptcy Court in the District of Maryland. In September 2007, Plaintiffs filed a Motion for Remand and for Attorney's Fees (under 28 U.S.C. § 1447(c)) for Wrongful Removal.

On March 14, 2008, the Bankruptcy Court entered an Order remanding the case to state court "with the exception of the request for attorney's fees." On March 25, 2008, Plaintiffs filed an Amended Motion to Remand asserting a claim for costs (including legal fees) under 28 U.S.C. § 1447(c) against CCE's counsel, William J. Murphy, Esquire and Douglas S. Draper, Esquire ("Appellants"). Appellants sought dismissal of the claims against them, contending that 28 U.S.C. § 1447(c) did not provide authority for the imposition of liability on counsel.

On the record of proceedings on September 4, 2008, the Bankruptcy Court stated that it had authority to impose liability on counsel under 28 U.S.C. § 1447(c), was going to deny dismissal of the claims against Appellants and would proceed to resolve the pending motion. On September 17, 2008, the Bankruptcy Court entered its "Order Resolving Preliminary Issues . . . " in which it denied dismissal of the attorneys' fee request and required further proceedings related thereto.

The Appellants sought leave to proceed with an interlocutory appeal from the Bankruptcy Court's September 17, 2007 Order. The Bankruptcy Court recommended that the Court accept the interlocutory appeal. Bankruptcy Certification [Document 10].

By Memorandum and Order Re: Interlocutory Appeal [Document 13] (the "Interlocutory Appeal Order"), the Court followed the recommendations of the Bankruptcy Court and granted Appellants leave to proceed with the instant interlocutory appeal.

## II. DISCUSSION

Although the instant appeal is from the Bankruptcy Court, the issue presented is not limited to bankruptcy cases. The question to be resolved is, whether, in connection with the remand of any case removed to federal court pursuant to 28 U.S.C. § 1447, a federal court can, by authority of 28 U.S.C. § 1447(c), impose liability for costs, including legal fees, upon the removing party's counsel.

The instant appeal does not present the question of whether, "no matter how groundless the removal or how egregious the conduct of an attorney in effecting [a] removal . . . a federal court is powerless to order an award against the attorney . . . ." Appellees' Brief at 1-2. Rather, the issue is whether a federal court, even though it may be authorized to impose an award against an attorney by other authority,<sup>2</sup> is also given authority to do so pursuant to § 1447(c). In more concrete terms, if a party does not seek sanctions against counsel for a

---

<sup>2</sup> For example, Rule 11 of the Federal Rules of Civil Procedure, 28 U.S.C. § 1927, the inherent authority of the Court. See Roadway Express, Inc. v. Piper, 447 U.S. 752, 765 (1980).

removing party under Rule 11, can that party obtain an award of costs (including legal fees) by virtue of § 1447(c)?

The instant appeal does not relate to the substantive merits of Plaintiff's claims against the Appellants.<sup>3</sup> Hence, the question before the Court is whether, assuming that a federal court remanding a case determines that an attorney removed the case without an objectively reasonable basis<sup>4</sup> for doing so, the federal court can - under authority of Section 1447(c) - impose liability for costs (including legal fees) upon counsel for the removing party.

The Court shall consider the statutory amendment at issue in light of the legislative history and context.

A. Judicial Decisions

There are appellate decisions that can be viewed as indicating that if a statute does not expressly authorize an imposition of liability on an attorney (as distinct from a party) the statute would usually be held to not so authorize. E.g. Roadway Exp., 447 U.S. at 761; Healey v. Chelsea Resources, Ltd., 947 F.2d 611, 624 (2d Cir. 1991) (stating that "absent some express provision such as that found in 28 U.S.C. § 1927, costs are assessed against parties, not against their attorneys");

---

<sup>3</sup> Essentially, Plaintiffs contend that Appellants did not have "an objectively reasonable basis", see Martin v. Franklin Capital Corp., 546 U.S. 132 (2005), for attempting to remove the case and Appellants contend that they acted properly.

<sup>4</sup> Id.

Zambrano v. City of Tustin, 885 F.2d 1473, 1482 n.28 (9<sup>th</sup> Cir. 1989) ("When Congress has authorized the courts to award attorneys' fees, it has done so explicitly."). None, however, have addressed the question now presented.

A few lower courts have addressed the issue and have reached inconsistent conclusions. Some have interpreted § 1447(c) to authorize awards against attorneys. See Polanco v. 21 Arden Realty Corp., 121 B.R. 425, 427-28 (S.D.N.Y. 1990) (assessing expenses against counsel without analyzing § 1447(c); Wisconsin v. Missionaries to Preborn, 798 F. Supp. 542, 544 (E.D. Wis. 1992) (stating that expenses may be imposed against counsel because "[a] contrary interpretation of § 1447(c) would be arguably inconsistent with both Rule 11, Federal Rules of Civil Procedure, and ethical rules of conduct for attorneys"); Peraza v. Mazak, 2008 WL 186613, \*3 (M.D. Fla. Jan. 18, 2008); Saxon v. Thomas, 2007 WL 1115239, \*6 (W.D. La. Apr. 12, 2007).

Other courts have held that § 1447(c) does not authorize the imposition of liability on attorneys. See Marketplace Illustrated, Inc. v. Intrex Travel, Inc., 1993 WL 405494, \*3 (W.D.N.Y. Nov. 30, 1993) (noting that plaintiff "cit[ed] no case indicating that attorney fees for improper removal under § 1447(c) should be exacted from counsel . . . " and "[t]herefore [counsel] will not be required to pay plaintiffs' attorney fees"); Creek Ventures, LLC v. World Parts, LLC, 2004 WL 1166642, \*4 (W.D.N.Y. Apr. 14, 2004) (refusing to impose expenses against

counsel "because the authority to award sanctions against the attorney under [§ 1447(c)] is unclear").

B. The Legislative Context

Prior to the 1988 amendment of § 1447(c), a party seeking removal of a case from state to federal court was subject to 28 U.S.C. § 1446(d) providing, in pertinent part:

Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

28 U.S.C. § 1446(d) (1982).

Accordingly, under § 1446(d), a party improperly removing a case was subject to liability for "all costs and disbursements incurred" by the party obtaining remand. Payment of the liability was secured by the requisite bond.

Furthermore, Rule 11 provided, in pertinent part:

The signature of an attorney [on a filed paper] constitutes a certificate . . . that the signer has read the . . . paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

\* \* \*

If a . . . paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the . . . paper, including a reasonable attorney's fee.

Fed. R. Civ. P. 11 (1983).

Accordingly, if an attorney signed a document effecting a wrongful removal, Rule 11 authorized the court to impose on the attorney and the represented party an appropriate sanction that could include the obligation to pay legal fees.

C. The 1988 Amendment of § 1447(c)

In 1988, Congress rescinded § 1446(d), thus eliminating the requirement that a removing party post a bond to satisfy a possible cost (including fee) award if remand were ordered.

Congress replaced the bond requirement in § 1446(d) with the following added to § 1447(c):

. . . An order remanding [an improperly remanded] case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

As stated in the House Judiciary Committee Notes regarding the rescission of § 1446(d):

Subsection (b)(3) [P.L. 100-702, Section 1016] deletes 28 U.S.C. § 1446(d) and thereby abolishes the bond requirement associated with

removal. The bond requirement imposes a cost that may be substantial to some litigants, and constitutes an additional procedural complication. A bond is not required on filing an action and should not be required on removal.

H.R. Rep. No. 100-889, at 72 (1988) reprinted in 1988

U.S.C.C.A.N. 5982, 6033.

The Committee Notes further stated that the purpose of the amendment of § 1447(c) was:

to ensure that the court may order payment of actual expense caused by an improper removal. As noted above, this provision would replace the bond provision now set out in section 1446(d), which covers payment of 'all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.'

\* \* \*

Moreover, the proposed amendment to section 1447(c) will ensure that a substantive basis exists for requiring payment of actual expenses incurred in resisting an improper removal; civil rule 11 can be used to impose a more severe sanction when appropriate.

Id.

Accordingly, the legislative history tends to indicate that the purpose of the amendment to § 1447(c) was to substitute for a removing party's obligation to post a bond, authority to impose on the removing party the obligation to pay the types of costs that had been secured by the bond. Moreover, inasmuch as Rule 11 authorized sanctions upon a represented party for counsel's



violation of the Rule, it was appropriate for the Committee to note that, in addition to § 1447(c) authority with regard to costs (including legal fees), Rule 11 authority was available for the imposition of more severe sanctions on the removing party when appropriate.

Indeed, it would have been unnecessary for Congress to amend § 1447(c) to add therein a redundant grant of authority to impose a sanction on an attorney effecting a wrongful removal since that authority already existed by virtue of Rule 11.<sup>5</sup>

D. Textual Indications

The text of the amendment to § 1447(c) is indicative that the provision was intended to affect a removing party and not counsel.

The amendment provides that "an order remanding the case may require payment of just costs . . . ." An order remanding a case to state court would normally, if not inevitably, be contemplated as one that pertains to parties and not counsel.

---

<sup>5</sup> There does not appear to be a significant difference - if any practical difference at all - between the standard for imposition of a § 1447(c) cost award [no objectively reasonable basis, Martin, 546 U.S. at 136] and a Rule 11 award [not grounded in fact and warranted by a good faith argument of law]. Moreover, § 1447(c) was amended five years prior to the 1993 amendment to Rule 11 imposing a 21 day "wait and see" obligation. Hence, in 1988, any authority to impose liability on counsel added to § 1447(c) would have been essentially identical to the then extant Rule 11 authority.

Moreover, the remand order is sent to the state court so it may proceed with the case. It appears unlikely that Congress would wish a sanction imposed by a federal court against an attorney for filing a removal in federal court to be included in a remand order sent to a state court before which the attorney would not necessarily remain as counsel of record. It is far more likely that Congress intended any liability imposed on counsel to be made pursuant to Rule 11 and to be enforced by the federal court imposing the sanction.

In addition, an award of costs (including legal fees) under § 1447(c) is to be included in a remand order. However, § 1447(d) provides in pertinent part:

An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . .<sup>6</sup>

Thus, the statute says that a remand order imposing an award under § 1447(c) would not be subject to appellate review. This would be an odd provision in regard to counsel who, if sanctioned under Rule 11, would have appellate rights but if held liable under § 1447(c) would not.<sup>7</sup>

In sum, the Court concludes that the 1988 amendment of § 1447(c), in light of the statutory text in its legislative

---

<sup>6</sup> Except as to a 28 U.S.C. § 1443 removal.

<sup>7</sup> A party, in contrast, would necessarily be proceeding in the case in state court and, presumably, could seek modification of the award as the state court proceeded with the case.

context, added authority to impose liability for costs (including legal fees) upon parties but not attorneys.

### III. CONCLUSION

For the foregoing reasons:

1. The Order of the Bankruptcy Court entered September 17, 2008 is REVERSED.
2. Judgment shall be issued, consistent herewith, by separate Order.

SO DECIDED on Tuesday, December 9, 2008.

\_\_\_\_\_/s/\_\_\_\_\_  
Marvin J. Garbis  
United States District Judge